

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD BENNETT,

Defendant-Appellant.

UNPUBLISHED

June 26, 2003

No. 239313

Livingston Circuit Court

LC No. 99-011127-FH

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his conviction as a second habitual offender, MCL 769.10, and his sentence of ten to fifteen years in prison for the underlying offense of breaking and entering a building with intent to commit larceny, MCL 750.110. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214 (E)(1)(b).

I. FACTS

Defendant was originally charged with breaking and entering a building with intent to commit larceny in Livingston County Circuit Court Docket No. 99-010993-FH. The prosecution did not file an habitual offender supplemental information within the time required by MCL 769.13(1) and the trial court granted the prosecution's motion to dismiss the case without prejudice. Subsequently, the prosecution reissued the breaking and entering charge and filed an habitual offender information in a timely manner.

A jury convicted defendant of breaking and entering a building with intent to commit larceny. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to ten to twenty years in prison, with credit for 195 days. In *People v Bennett*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 222608) [hereinafter *Bennett I*], another panel of this Court affirmed defendant's conviction, but remanded for resentencing on the ground that he was incorrectly sentenced as a third habitual offender because the prior convictions on which the habitual offender charge was based arose out of the same incident. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987).

On remand, the trial court sentenced defendant as a second habitual offender to ten to fifteen years in prison, with credit for 1044 days. In imposing sentence, the trial court adopted the remarks it made at the original sentencing hearing.¹

A prosecuting attorney may seek to enhance the sentence of a defendant as an habitual offender by filing a written notice of his intent to do so within twenty-one days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within twenty-one days after the filing of the information charging the underlying offense. MCL 769.13(1); *People v Hornsby*, 251 Mich App 462, 470; 650 NW2d 700 (2002).

II. REFILING OF CHARGES

A. Standard of Review

The "de novo" standard of review applies to whether the prosecutor has filed a timely habitual offender notice. *People v Ellis*, 224 Mich App 752; 569 NW2d 917 (1997).

B. Analysis

On appeal, defendant argues that the prosecutor improperly dismissed the original case in order to refile the same charge and file a habitual offender notice. We disagree. In *Bennett I*, the Court rejected defendant's argument that the trial court abused its discretion by granting the prosecution's motion to dismiss the original case, finding that defendant and his counsel had notice of the prosecution's intent to dismiss and reissue the charges, and that defendant was rearraigned and given the opportunity to argue a motion to dismiss the reinstated charges. In *Bennett I*, the Court observed that as long as jeopardy has not attached or the statute of limitations has not run, a prosecutor is permitted to reinstate charges and begin a case anew. *Bennett I*, *supra*, slip op at 12-13. This holding constitutes the law of the case, and defendant has not shown that justice would not be served by application of that doctrine in this instance. *People v Herrera (On Remand)*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994).

III. SENTENCING

A. Standard of Review

A sentence imposed on a habitual offender is reviewed only for an abuse of discretion. *People v Hansord*, 454 Mich 320, 324; 562 NW2d 460 (1997). "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Id.* at 326

¹ At the original sentencing hearing the trial court cited defendant's prior record, which consisted of three felony convictions for armed robbery, MCL 750.529, criminal sexual conduct in the third degree, MCL 750.520d, and possession of a firearm during the commission of a felony, MCL 750.227b, and the fact that defendant committed a new offense four months after being paroled, as the basis for imposing the sentence that it did.

B. Analysis

Defendant argues that even assuming that he was properly convicted as a second habitual offender, his minimum term of ten years was disproportionate to his circumstances and those of the offense. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. The judicial sentencing guidelines do not apply to the sentencing of an habitual offender,² *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997), and may not be considered in determining an appropriate sentence for an habitual offender. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Nevertheless, a sentence for an habitual offender must be proportionate to the seriousness of the offense and the offender's prior record. If an habitual offender's underlying criminal record indicates that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate. *People v Compeau*, 244 Mich App 595, 598-599; 625 NW2d 120 (2001). Defendant's prior record consisted of three assaultive offenses. He served approximately twenty years in prison for these offenses, and during that time accumulated several major misconducts for violent behavior. Defendant was discharged from parole only four months before he committed the instant offense. Defendant's prior criminal record and his current conviction demonstrate that he is unable to conform his conduct to the law. His sentence is proportionate and does not constitute an abuse of discretion under the circumstances. *Compeau, supra*.

Affirmed.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Bill Schuette

² The judicial sentencing guidelines were in effect at the time of defendant's offense. The statutory sentencing guidelines do not apply retroactively to offenses committed before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).